

No. 18-656

In the Supreme Court of the United States

JOHNATHAN HALL, WARDEN

Petitioners

v.

WILLIAM O. AYERS

Respondent

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

The Kentucky Supreme Court held that a defendant proceeding pro se in a criminal case who is “an experienced criminal trial lawyer” has no right to counsel to waive because that lawyer, although a defendant, is herself the *counsel* guaranteed by the Federal Constitution. Kentucky’s reformulation of black letter federal constitutional law would strip a subset of the legal profession of the right to counsel guaranteed by *Gideon v. Wainwright*, 372 U.S. 335 (1963). As the federal court below explained, “[t]o affirm the Kentucky Supreme Court’s decision in this case, we would need to hold that a defendant who was never allegedly informed of his right to counsel, never spoke of a desire to represent himself, and was never asked if he wanted to proceed pro se, had nonetheless waived his right to counsel simply by appearing alone.” *Ayers v. Hall*, 900 F.3d 829, 836-37 (6th Cir. 2018); Petitioner’s Appendix (“Pet. App.”) 12-13.

Accordingly, the question presented is:

Whether the federal court of appeals below correctly found the Kentucky Supreme Court’s adjudication that trial courts need not obtain a waiver of the right to counsel from “criminal defendants who are experienced criminal trial attorneys” proceeding without counsel was contrary to clearly established Federal law as announced in *Carnley v. Cochran*, 369 U.S. 506 (1962), and *Faretta v. California*, 422 U.S. 806 (1975), in a context where, as conceded by the Petitioner, the record

below contains no evidence of a waiver of the right to counsel, either by word or conduct, and where the Respondent prior to trial moved for a continuance to retain counsel of his own choice because he was incompetent to try the case against him.

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JURISDICTION

Contrary to Petitioner's assertion, this Court does not have jurisdiction over this case pursuant to 28 U.S.C. § 2254(d)(1). Petition, 1. This Court has jurisdiction under 28 U.S.C. § 1254(1). Supreme Court Rule 15(2).

STATEMENT OF THE CASE

During the nearly two years that Respondent Ayers represented himself on five counts of failing to file a state income tax return, the trial judge had no information as to his experience as a criminal defense lawyer except her off the record personal knowledge regarding his legal career. No evidence pertaining to Ayers' legal experience was before the court until after the jury was sworn and the prosecution presented its case in chief. At no time during which a *Faretta v. California*, 422 U.S. 806 (1975), inquiry of some type could have been made was there any record evidence before the court as to Ayers' experience as a criminal trial attorney. Ayers never filed a notice of appearance of any kind, never appeared with co-counsel for any purpose, and never filed a motion to be allowed to proceed pro se. Nevertheless, for some inexplicable reason, the trial judge confronted by a criminal defendant appearing on his own without counsel never advised Ayers of his right to counsel or made any effort to ascertain he was aware of that right. Then on the eve of trial Ayers requested a brief continuance to obtain counsel of his own choice to represent him, stating he was incompetent to represent himself on these charges. Faced with a request for a continuance based on the defendant's explicit acknowledgment that he needed

an attorney to represent him, the trial judge dismissed the request, denied the continuance and, despite the mandate of the Sixth Amendment, made no effort to determine whether Ayers had understood his right to counsel while he proceeded without a lawyer. Nowhere in the record did the trial judge state she was omitting any type of *Faretta* inquiry or declining to question him about his decision to represent himself because Ayers was an experienced criminal defense attorney.

On his direct appeal of his conviction by jury of all five counts, the Kentucky Court of Appeals unanimously found “no indication” that the trial judge “either engaged in any type of *Faretta* inquiry or addressed whether Ayers was capable of representing himself ” and reversed and remanded the case to the trial court. *William Ayers v. Commonwealth*, 2012 Ky. App. Unpub. LEXIS 1029 (03/30/2012).

The Commonwealth sought and obtained from the Kentucky Supreme Court discretionary review on the question whether the trial court’s failure to conduct a *Faretta* hearing required the court to set aside the conviction of Ayers, an experienced criminal trial lawyer. The *Ayers* court emphasized that it was “dispens[ing] with the charade of combing the record for some shred of evidence that *Faretta* was satisfied” and instead created a new rule of federal constitutional law that “criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or inquiry prior to representing themselves.” *Commonwealth v. Ayers*, 435 S.W.3d 625, 629 (Ky. 2013); Pet. App. 46-47.

The Kentucky Supreme Court provided no guidance on how or when a trial court would determine whether a defendant-attorney was “an experienced criminal trial attorney” so that the mandate of *Faretta* and *Carnley v. Cochran*, 369 U.S. 506 (1962), could be bypassed completely.

The *Ayers* court noted that it was one of the few jurisdictions that recognizes a criminal defendant’s right to hybrid representation where the defendant is represented by both a lawyer and herself. *Ayers v. Commonwealth*, 627-28; ; Pet. App. 43. The opinion observed that Kentucky and other jurisdictions had previously held when an accused has hybrid representation, he is not entitled to a *Faretta* warning. From this premise, the *Ayers* court emphasized that when a defendant-attorney represents himself, logic indicates that as the accused “was never without the benefit of counsel,” the defendant himself, *Faretta* does not apply. *Id.*, 628; Pet. App. 45. The *Ayers* court’s analysis in 2013 overlooked that in 2005 the Kentucky Supreme Court had held “[w]hen a defendant makes a request to proceed pro se or for hybrid representation, the principles of *Faretta* become applicable.” *Deno v. Commonwealth*, 177 SW 3d 753, 758 (Ky. 2005); (emphasis added). *Deno* remains controlling precedent in Kentucky today. See *Zapata v. Commonwealth*, 516 S.W.3d 799, 802 (2017). The Kentucky Supreme Court reversed the intermediate appellate court and reinstated the judgment of the trial court.

Following an unsuccessful petition for rehearing, Ayers timely sought a writ of certiorari from this Court, but his petition was denied on October 6, 2014. *William Ayers v. Kentucky*, 135 S. Ct. 86 (2014).

Ayers then petitioned for relief under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Kentucky, arguing, via counsel, that the trial court violated the Constitution (1) by failing to determine whether Ayers had ever knowingly and voluntarily waived his rights under the Sixth and Fourteenth Amendments to the assistance of counsel, and (2) by denying Ayers' motion for a continuance to obtain counsel of his choice. The district court denied Ayers' petition, but granted a certificate of appealability as to the waiver issue. Ayers filed a notice of appeal and successfully moved the Sixth Circuit Court of Appeals to expand the certificate of appealability to include the second issue, *i.e.*, whether the continuance to hire counsel of Ayers' own choice should have been granted.

The Sixth Circuit found, pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), that "the Kentucky Supreme Court acted contrary to clearly established Supreme Court precedent when it held that trial courts need not 'obtain a waiver of counsel' before allowing 'experienced criminal trial attorneys' to represent themselves," and concluded upon de novo review of the record that Ayers did not validly waive his right to counsel. The federal appeals court reversed the district court's denial of Ayers' petition under 28 U.S.C. § 2254 and remanded with instructions to grant the writ unless the Commonwealth of Kentucky elects to retry Ayers within ninety days of its judgment. Because Ayers obtained full relief on his waiver claim, the Sixth Circuit declined to decide whether the state trial court also violated Ayers' right to counsel of his choice by declining to grant a continuance so that he could secure counsel.

Citing *Faretta*, 819, *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004), and *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), the Sixth Circuit held “the Kentucky Supreme Court acted contrary to clearly established federal law when it held that trial courts need not ‘obtain a waiver of counsel’ from ‘criminal defendants who are experienced criminal trial attorneys.’” *Ayers v. Hall*, 835; Pet. App. 9. The Sixth Circuit found incorrect the Kentucky Supreme Court’s premise that defendants who happen to be criminal trial attorneys are never without counsel, because “[e]very defendant – regardless of his profession – is entitled to counsel unless he waives his right to counsel.” *Id.*

As the Sixth Circuit noted, “the record is devoid of any indication that Ayers was told of his right to counsel or that he affirmatively declined to exercise that right” and emphasized that “counsel for Kentucky conceded at oral argument that Ayers never ‘invoke[d] his right to proceed pro se’ and never ‘validly waive[d] his Sixth Amendment right to counsel.’” *Id.*, 836; Pet. App. 10.

REASONS FOR DENYING THE WRIT

I. The Petition Presents No Compelling Reason to Grant the Writ.

The Petitioner has not provided a compelling reason for this Court to grant this petition for a writ of certiorari, whether for full briefing or summary reversal. Supreme Court Rule 10. This petition cites no federal court of appeals’ decision that conflicts with the holding of the federal court of appeals below. Similarly, Petitioner cites no conflict between

the decision of the Kentucky Supreme Court in this matter and the decision of any state court of last resort or federal court of appeals. Finally, the petition has identified no important federal question that conflicts with relevant decisions of this Court.

Petitioner has provided no other court decision that has announced a rule comparable to the Kentucky Supreme Court's edict that a trial court need not obtain a waiver of the right to counsel from "criminal defendants who are experienced criminal trial attorneys," who proceed without counsel in their criminal trials. *Commonwealth v. Ayers*, 628-29; Pet. App. 46-47. Nor does the petition identify any other court decision in which such a rule was even discussed but rejected. When faced with the question of whether an accused criminal defense attorney who proceeded pro se without an on the record *Faretta* inquiry had waived his right to counsel, courts have uniformly resolved this question by examining the record to find evidence of at least an implicit waiver. The Kentucky Supreme Court explicitly eschewed that approach, noting it would "dispense with the charade of combing the record for some shred of evidence that *Faretta* was satisfied." *Id.*, 629; Pet. App. 46.

Federal courts of appeal and state courts of last resort have repeatedly and consistently applied *Carnley* and *Faretta* when confronted with an experienced criminal trial lawyer who had represented herself in a criminal trial despite the absence of an explicit on the record waiver of the right to counsel. Those courts have examined the record for evidence that the defendant-attorney was offered counsel, but intelligently and understandably rejected that offer.

Conversely, the Commonwealth has never “argue[d] that Ayers waived his right to counsel by his conduct” and explicitly conceded there was no waiver of counsel on the record. *Ayers v. Hall*, 836; Pet. App. 12. Such an argument would have been fruitless as Ayers never filed a notice of appearance of any kind, never appeared with co-counsel for any purpose, and never filed a motion to be allowed to proceed pro se. *Id.*

In this overall context, Petitioner has not identified an important question of federal law that has not been decided by this Court or should be decided by this Court. There is no compelling reason to grant this petition.

II. The Petition Omits Any Reference to the Petitioner’s Concession at Oral Argument That Ayers Never Invoked His Right to Proceed Pro Se and Never Validly Waived His Sixth Amendment Right to Counsel or to the Kentucky Supreme Court’s Expressed Refusal to Examine the Record for Evidence That Ayers Waived His Right to Counsel.

The Sixth Circuit emphasized that “counsel for Kentucky conceded at oral argument that Ayers never ‘invoke[d] his right to proceed pro se’ and never ‘validly waive[d] his Sixth Amendment right to counsel.’” *Ayers v. Hall*, 836; Pet. App. 10. Equally important, the Kentucky Supreme Court explicitly “dispense[d] with the charade of combing the record for some shred of evidence that *Faretta* was satisfied.” *Commonwealth v. Ayers*, 629; Pet. App. 46.

Nowhere in the Petition is there any mention of either the Petitioner's concessions below regarding the absence of any record evidence of Ayers waiving his right to counsel or the Kentucky Supreme Court's refusal to review the record for any evidence of compliance with *Faretta*. Supreme Court Rule 15(2).

In view of Petitioner's concessions as to the waiver issue as well as the Kentucky Supreme Court's explicit refusal to review the record for evidence of a waiver of Ayers' right to counsel, this Petition should be denied.

III. The Kentucky's Supreme Court's Removal of Experienced Criminal Trial Attorneys From the Protection of the Sixth Amendment's Right to Counsel Would Have Serious Adverse Consequences to Those Lawyers in Other Applications of the Right to Counsel, if the Sixth Circuit's Ruling is Reversed.

What are the ramifications of the Kentucky Supreme Court's distortion of the applicability of the right to counsel to exclude experienced criminal trial lawyers, if the Sixth Circuit's ruling is reversed? Would an indigent criminal defendant, who is an experienced criminal trial attorney, be denied appointed counsel because he already has counsel – himself? *Gideon v. Wainwright*, 372 U.S. 335 (1963). “[A]n element of this right [to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Would the Sixth Amendment's

right to counsel of choice be limited by the Kentucky Supreme Court's holding that an experienced criminal trial attorney already has counsel – herself?

In the context of the Fifth Amendment right to counsel, should police officers when conducting the interrogation of a suspect, who is an experienced criminal trial lawyer, be permitted to disregard the requirement to inform the suspect that “he has the right to consult with a lawyer and to have the lawyer with him during interrogation” because the suspect already has counsel present – himself? *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). “Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request [for counsel] is a prerequisite.” *Id.* The answer in either context is no.

How would the Kentucky Supreme Court's limitation on the right to counsel apply when government agents surreptitiously obtain incriminating words from an indicted experienced criminal trial attorney in the absence of his counsel? *Massiah v. United States*, 377 U.S. 201, 206 (1964). According to the Kentucky Supreme Court, that indicted defendant-attorney would always be with counsel – himself. No harm, no foul?

The Kentucky Supreme Court's erosion of one facet of the protection provided by the Sixth Amendment's right to counsel, if allowed to stand, could have unintended adverse consequences well beyond the *Faretta* situation it confronted and resolved, albeit erroneously. *Commonwealth v. Ayers, supra*, makes very possible, if not likely, in Kentucky the predicted

diverse applications of the rubric “an experienced criminal trial lawyer” always has counsel as required by the Sixth Amendment. The published *Ayers* opinion raises the possibility this misanalysis of the right to counsel could spread to other jurisdictions despite its inherent fallacy.

The Petition should be denied.

IV. The Kentucky Supreme Court’s Interpretation of the Right to Counsel Taken to Its Logical Conclusion Would Deny All Lawyers, Regardless of Their Legal Experience, of the Protections of *Faretta* and *Carnley* When Appearing Without Representation.

According to the Kentucky Supreme Court, “[a] *Faretta* hearing was unnecessary in the present case because Ayers was not exercising his right to proceed without a lawyer.” *Commonwealth v. Ayers*, 627; Pet. App. 43. “As an attorney, Ayers never forewent the benefits of counsel. There was a lawyer and a defendant who, in this case, were uniquely one and the same.” *Id.* “[B]ecause Ayers was himself an attorney,” the Kentucky Supreme Court reasoned, “from indictment through sentencing, Ayers was never without the benefit of counsel.” *Id.*, 628; Pet. App. 45. The *Ayers* opinion emphasized that “*Faretta* does not address the quality of counsel. Its requirements are not invoked when a defendant is represented by a callow and inexperienced lawyer fresh from the bar exam.” *Id.*, 629; Pet. App. 46.

In this context, it would seem that the Kentucky Supreme Court's reasoning for finding that Ayers as a criminal defendant representing himself was at all times represented by counsel would be equally applicable to every defendant-lawyer regardless of her experience or expertise. Taking this analysis to its logical conclusion, any defendant-lawyer appearing without counsel should be presumed to be proceeding with counsel, which, according to the Kentucky Supreme Court, would negate any need for a waiver of that defendant's Sixth Amendment right to counsel.

Under this reasoning, any person with a law degree, even one who has never practiced law, appearing alone in a criminal case, would be regarded as proceeding with counsel in satisfaction of the right to counsel. This would be equally true of any lawyer-defendant who had never practiced criminal law and never tried a case before a judge or a jury, regardless of his or her area of expertise, such as tax law or real estate law.

Under these circumstances, this case is an unsuitable vehicle for a grant of certiorari.

V. The Sixth Circuit in Conformity With AEDPA Explicitly Analyzed and Rejected the Kentucky Supreme Court's Conclusion That Experienced Criminal Trial Attorneys When Proceeding Pro Se are not Counselless.

The petition claims that the federal court of appeals disregarded the Kentucky Supreme Court's

finding of an allegedly “material, distinguishing circumstance” that made the requirements of *Carnley* and *Faretta* inapplicable, *i.e.*, that Ayers, an experienced criminal trial lawyer, was not without counsel for Sixth Amendment purposes because he was himself counsel as mandated by the Constitution. This claim is erroneous. The federal court of appeals below specifically examined that fallacy in the Kentucky Supreme Court’s syllogism. “The Kentucky Supreme Court derived its decision from the correct premise that the Sixth Amendment’s waiver requirements apply only to uncounseled defendants and the incorrect premise that defendants who happen to be criminal trial attorneys are never without counsel.” *Ayers v. Hall*, 835; Pet. App. 9. That premise is incorrect because “[e]very defendant – regardless of his profession – is entitled to counsel unless he waives his right to counsel.” *Id.*; Pet. App. 9-10.

Although masked as a finding by Petitioner, the Kentucky Supreme Court’s conclusion that Ayers, as both an experienced criminal trial attorney and a defendant, was counsel for Sixth Amendment purposes, was merely an explicit contraction of the parameters of the established right to counsel guaranteed to every criminal defendant facing a felony charge, regardless of profession or monetary worth. To suggest that the federal court of appeals “disregarded th[is] determinative finding” of the Kentucky Supreme Court is to misrepresent the complete analysis undertaken by the federal appellate court below.

The federal appeals court below did exactly what AEDPA requires a federal habeas corpus court to do

when analyzing a petitioner's claim that the state court proceedings deprived him of a federal constitutional right.

The Petition does not present an issue that merits a grant of certiorari.

VI. As the Federal Court of Appeals Held, the Kentucky Supreme Court's Ruling Was Contrary to Established Federal Law Contained in *Carnley v. Cochran* and *Faretta v. California*.

Petitioner asserts that "there is no clearly established federal law as determined by this Court" that "justifies disregarding" the "material, distinguishing circumstance" that Ayers was an experienced criminal trial lawyer as found by the Kentucky Supreme Court. Petition, 5. However, both *Carnley v. Cochran* and *Faretta v. California* are well established general rules of federal constitutional law.

As *Carnley* holds, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley*, 516. As the petitioner conceded during oral argument in the federal court of appeals, Ayers "never 'invoke[d] his right to proceed pro se' and never 'validly waive[d] his Sixth Amendment right to counsel.'" *Ayers v. Hall*, 836, citing Oral Arg. at 19:35-46, 22:19-35; Pet. App. 10. "Presuming waiver from a silent record is impermissible." *Carnley*, 516.

Similarly, as *Faretta* holds, “in order to represent himself, the accused must ‘knowingly and intelligently’ forgo” “many of the traditional benefits associated with the right to counsel.” *Faretta v. California*, 422 U.S. 806, 835 (1975)

“That the standard is stated in general terms does not mean the application was reasonable.” *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 2858 (2007). “AEDPA does not ‘require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.’” *Panetti, supra*, quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (KENNEDY, J., concurring in judgment). Petitioner contends that the situation before the Kentucky Supreme Court, *i.e.*, that the accused was an experienced criminal trial lawyer, exempted him from the general rules of *Carnley* and *Faretta*, both *supra*. The rationale for this conclusion is that a criminal defendant proceeding pro se is not “uncounseled” when the accused is an attorney. Petitioner cites to this Court’s opinions in *Faretta* and its progeny to conclude in none of those cases was the accused a lawyer. That is simply noting that the factual equation in Ayers’ case is not exactly identical to the circumstances of those cases where the general rule was announced and previously applied. The Kentucky Supreme Court was not faced with the need to extend the general federal constitutional standard to apply it to Ayers’ situation. Instead of applying the general rule, the Kentucky Supreme Court elected to carve out an exception unwarranted by established Federal law.

AEDPA does not “prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts “different from those of the

case in which the principle was announced.”” *Panetti, supra*, quoting from *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). This is what the federal court of appeals found in Ayers’ case. Petitioner erroneously believes that a general rule such as announced in *Carnley* and *Faretta* cannot be applied unreasonably. AEDPA “recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner,” such as the Kentucky Supreme Court did here. *Panetti, supra*. A state court’s adjudication can be contrary to established Federal law when either “the reasoning” or “the result of the state-court decision contradicts” this Court’s general rules of constitutional law. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). “Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). The Sixth Amendment right to counsel at trial is such a fundamental principle as is the necessity of a valid waiver if a defendant intends to decline that right. The Kentucky Supreme Court’s decision to exempt all experienced criminal trial lawyers from the protection of the Sixth Amendment is contrary to established Federal law in both its reasoning and its result.

“[S]tate courts must reasonably apply the rules ‘squarely established’ by this Court’s holdings to the facts of each case.” *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014), quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). The Kentucky Supreme Court failed to reasonably apply the squarely established holdings in *Carnley* and *Faretta* to the facts of Ayers’ case. Ayers

had a federal constitutional right to counsel other than himself and he did not in any way waive that right by simply being an experienced criminal trial lawyer.

Because the Sixth Circuit correctly found the Kentucky Supreme Court's decision in Ayers' case was contrary to established Federal law, the Petition should be denied.

CONCLUSION

For the reasons delineated above, this Court should deny the petition for certiorari and allow the Sixth Circuit Court of Appeals' grant of a conditional writ of habeas corpus to stand.

Respectfully submitted,

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